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NO. 57691-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED ON REMAND

Whether the trial court properly calculated defendant Oliver Weaver's offender score.

B. SUPPLEMENTAL STATEMENT OF THE CASE

In December of 2002, Weaver violently raped 13-year-old R.T. State v. Weaver, 140 Wn. App. 349, 351, 166 P.3d 761 (2007), review granted in part and remanded, 166 Wn.2d 1014 (2009). R.T., fearful of Weaver, did not report the rape until she discovered that she was pregnant. Id. She aborted the fetus, and DNA testing confirmed that Weaver was the father. Id. at 351-52.

A jury convicted Weaver of second-degree rape and second-degree rape of a child. Weaver was subject to indeterminate sentencing under RCW 9.94A.712.

Prior to sentencing, the superior court ordered the Department of Corrections ("DOC") to prepare a presentence report. CP 196. DOC prepared a presentence report, which included a list of Weaver's criminal history. CP 193-95. The report identified two felony convictions: a 1981 second-degree burglary conviction and a 1985 second-degree burglary conviction. CP 195. The report also listed five misdemeanor convictions dated 1978,

1987, 1988, 1993, and 1996. Id. This report was not originally made part of the Superior Court file.

The State also submitted and filed a presentence report, which included the identical criminal history list submitted by DOC. CP 190. The State calculated Weaver's offender score as 2. CP 188-89.

At sentencing, Weaver did not dispute his criminal history. Instead, he acknowledged that he had criminal history dating from his "younger days" and requested that the court impose the minimum confinement time. RP 378-80. The court imposed the maximum sentence of life and a minimum term exceptional sentence of 250 months. CP 74-78.

On appeal, Weaver claimed, among other issues, that the trial court erred by including his two prior felony convictions in his offender score, claiming that they washed out. Brief of Appellant dated December 19, 2006, at 23-28.

In response, the State noted that the State's presentence report listed Weaver's criminal history, including several misdemeanor convictions that prevented Weaver's felony convictions from washing out. Brief of Respondent dated February 27, 2007, at 25-30. The State argued that because Weaver did not

dispute his criminal history at the sentencing hearing, he had acknowledged his criminal history under former RCW 9.94A.530(2). Id. At the time of Weaver's sentencing, that statute provided that "[a]cknowledgement includes not objecting to information included in the presentence reports." Former RCW 9.94A.530(2).¹

Weaver subsequently cited State v. Mendoza, 139 Wn. App. 693, 162 P.3d 439 (2007), aff'd, 165 Wn.2d 913, 205 P.3d 113 (2009), as additional authority. In Mendoza, Division II held that the term "presentence reports" in RCW 9.94A.530(2) refers to "documents prepared by the Department of Corrections (DOC) at the trial court's request under RCW 9.94A.500." Id. at 702-03. The court rejected the argument that "the statement of prosecuting attorney" submitted for sentencing qualified as a "presentence report." Id. at 707-08.

In response, after confirming that the trial judge had a copy of DOC's presentence report in this case, the State moved to supplement the record with this report. Motion to Supplement Record dated July 25, 2007. Weaver did not oppose the motion.

¹ After Weaver's sentencing, the statute was amended to provide that acknowledgment also includes "not objecting to criminal history presented at the time of sentencing." Laws of 2008, ch. 231, § 4.

On August 27, 2007, this Court issued its published opinion, rejecting Weaver's challenge to his offender score and disagreeing with Division II's analysis in Mendoza. The court held that "the term 'presentence reports' in RCW 9.94A.530 includes criminal history information submitted by the State." Weaver, 140 Wn. App. at 351. The Court denied the State's motion to supplement the record with the DOC presentence report, explaining that it was unnecessary given the court's resolution of the issue. Id. at 356 n.22.

Weaver petitioned for review. The Supreme Court granted review in Mendoza and deferred ruling on Weaver's petition. On April 16, 2009, the Supreme Court issued its opinion in Mendoza and affirmed Division II's opinion. On July 8, 2009, the Supreme Court granted Weaver's petition "only on the offender score issue" and "remanded to the Court of Appeals, Division One, for reconsideration in light of State v. Mendoza, 165 Wn.2d 913." Order dated July 8, 2009. Over Weaver's objection, this Court granted the State's renewed motion to supplement the record with the DOC presentence report. The Court then requested the parties provide supplemental briefing "addressing any issues that appear to be meritorious under the circumstances."

C. ARGUMENT

**1. THE TRIAL COURT PROPERLY INCLUDED
WEAVER'S PRIOR CONVICTIONS IN HIS
OFFENDER SCORE.**

Under the Sentencing Reform Act, a sentencing court may rely upon a defendant's acknowledgement of his prior convictions without further proof. A defendant acknowledges his prior convictions when he does not object to his criminal history listed in a DOC presentence report. In this case, because Weaver did not dispute DOC's account of his criminal history, this Court should affirm his sentence.

A sentencing judge may rely on facts that are "admitted, acknowledged, or proved... at the time of sentencing." Former RCW 9.94A.530(2). "Acknowledgement includes not objecting to information included in the presentence reports." Id.; see also In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873-74, 123 P.3d 456 (2005).

In State v. Mendoza, 165 Wn.2d 913, 921, 205 P.3d 113 (2009), the Washington Supreme Court addressed "what the legislature intended as a 'presentence report'" under former RCW 9.94A.530(2). Mendoza involved two consolidated cases where the prosecutor filed statements of prosecuting attorney that listed the

defendants' criminal histories. Id. at 917-19. In both cases, the defendants did not object, though neither affirmatively agreed with the statement of criminal history. Id. On appeal, the defendants challenged the calculation of their offender scores. In response, the State argued that the criminal history summary qualified as a presentence report and that the defendants' failure to object constituted an acknowledgment of that history. Id. at 920.

The Washington Supreme Court rejected this argument. The court initially observed that, "[w]hile 'presentence report' is not defined, it is frequently referred to in sentencing statutes as a report completed by the Department of Corrections." Id. at 922. The Court noted that a recent amendment to the SRA expressly allowed the trial court to rely upon a "criminal history summary relating to the defendant from the prosecuting authority." Id. at 924. Given this amendment, the Court concluded that "the prosecutor's statement of a defendant's criminal history is not a presentence report for the purposes of former RCW 9.94A.500(1) and former RCW 9.94A.530(2)." Id. at 924-25.

In Mendoza, the Supreme Court disapproved of the earlier opinion in this case, which affirmed Weaver's sentence based upon his failure to object to his criminal history in the State's presentence

report. 165 Wn.2d at 929 n.8. However, the record in this appeal is now supplemented with DOC's presentence report. CP 193-95. That report also lists Weaver's criminal history, and at sentencing, Weaver did not object or dispute this criminal history. Under former RCW 9.94A.530(2), Weaver's failure to object to DOC's report of his criminal history constituted an acknowledgement of its truth, and the trial court was entitled to rely upon it when calculating his offender score.

Recently, when Weaver opposed the State's renewed motion to supplement the record with the DOC presentence report, he stated that he "could not and does not agree that this report was provided to the trial court at the original sentencing...." Response to State's Motion to Supplement the Record and Reconsider dated August 26, 2009 at 3. However, prior to moving to supplement the record, the State first confirmed that the trial court had a copy of the presentence report. Motion to Supplement Record dated July 25, 2007 at 3. In fact, the DOC presentence report indicates that it was provided to the court, Weaver's attorney David Gehrke and the prosecutor. CP 194. At sentencing, attorney Gehrke attempted to explain the representation in the report that Weaver had refused to participate in a presentence interview with DOC. CP 194; RP 378.

The record sufficiently establishes that the court and parties had DOC's presentence report.

If this Court determines that the record does not establish that Weaver acknowledged his criminal history, the proper remedy is to remand for an evidentiary hearing to allow the State to prove Weaver's offender score by a preponderance of evidence. When there is no objection at sentencing and the sentencing court never had an opportunity to correct any errors, it is appropriate to allow additional evidence at sentencing. Mendoza, 165 Wn.2d at 930.

D. CONCLUSION

For all the foregoing reasons, Weaver's convictions and sentence should be affirmed.

DATED this 30th day of November, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. OLIVER WEAVER, Cause No. 57691-7-I, in the Court of Appeals of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

LeBrame
Name
Done in Seattle, Washington

11/30/09
Date